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No. 99-409

IN THE
Supreme Court of the United States

HARTFORD UNDERWRITERS INSURANCE COMPANY,
Petitioner,

v.

MAGNA BANK, N.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION

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BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS*

Amicus curiae American Insurance Association ("AIA") respectfully submits this brief in support of the petition for writ of certiorari to the Eighth Circuit.[1]

AIA is a national trade association consisting of over 375 property and casualty insurers. AIA's member com-

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae* and its member companies, made a monetary contribution to the preparation or submission of this brief. Petitioner Hartford Underwriters Insurance Company is a member of *amicus curiae* American Insurance Association.

panies write workers' compensation insurance throughout the country and account for approximately 42 percent of all such insurance sold by privately-owned insurers. AIA frequently participates as an *amicus curiae* in litigation, such as this case, raising issues of importance to its membership.

The question presented in this case is whether a workers' compensation insurer that provides coverage to an insolvent employer during the period of bankruptcy has standing under section 506(c) of the Bankruptcy Code, 11 U.S.C. § 506(c) (1994), to move the bankruptcy court for payment of premiums out of the collateral of the debtor's secured lender. This issue is one of concern to AIA's members because it substantially affects their rights in the many thousands of instances annually where the employer insured is in bankruptcy.

State laws mandate the purchase of workers' compensation insurance by employers that cannot qualify to self-insure, such as insolvent businesses. Accordingly, employers in chapter 11 proceedings must purchase coverage if they are to reorganize successfully. Insurers will be unwilling to underwrite insurance for an insolvent employer, however, unless there is adequate assurance of payment.

Section 506(c) of the Bankruptcy Code provides such assurance. It allows recovery of unpaid premiums from the collateral of the debtor's secured creditors to the extent such insurance protects the collateral. Section 506(c) is critical for the protection of the insurer. The right to payment out of the debtor's unsecured assets is often an illusory remedy when the debtor does not or cannot pay, because the debtor rarely has any significant unencumbered property. Recourse to the debtor's secured assets is frequently the only meaningful remedy for nonpayment.

The decision of the Eighth Circuit deprives insurers of this essential protection. It prohibits them from obtaining a payment order directly from the bankruptcy court and instead places the insurer at the sufferance of the trustee's discretionary decision whether to pursue the insurer's claim. Unlike the insurance carrier, the trustee has no economic incentive to seek payment aggressively because, by the time of nonpayment, the insurance already has been provided and, under the Bankruptcy Code, cannot be canceled regardless of nonpayment absent relief from the bankruptcy court. *See* 11 U.S.C. § 362(a) (1994).

AIA's member companies thus have a significant interest in the outcome of this litigation because it will substantially affect their ability to receive the premiums promised for their assumption of risk and, indeed, will strongly influence their willingness to afford coverage in the first instance.[2]

SUMMARY OF ARGUMENT

In this case, the Eighth Circuit denied a workers' compensation insurer standing under section 506(c) of the Bankruptcy Code to recover unpaid insurance premiums out of the debtor's secured assets. The lower court reached this conclusion notwithstanding that: (1) the debtor's purchase of such insurance was necessary in order for it to remain in business; (2) the insurer provided the coverage after the bankruptcy filing and thus had a priority for payment; (3) the debtor consented to an order requiring payment, but then did not comply with that order; (4) the debtor had no unencumbered assets out of which the premiums subsequently could be paid; and (5) the debtor's lender consented to use of its collateral to pay neces-

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[2] Both petitioner and respondent have consented to the filing of this brief, and their letter of consent has been filed with the Office of the Clerk of this Court.

sary administrative expenses, including workers' compensation insurance. The Eighth Circuit rationalized this harsh result on the grounds that section 506(c) referred only to the "trustee" and thus did not allow a claim for administrative expenses to be asserted by the post-filing vendors which this provision was created to protect.

As the petition for *certiorari* demonstrates, this case presents an important issue concerning an administrative expense claimant's rights under section 506(c), as to which there is a 4-2 circuit court split. More broadly, this controversy presents issues of general importance concerning proper interpretation of the Bankruptcy Code, in three respects.

First, like section 506(c), numerous other provisions of the Bankruptcy Code explicitly refer only to the "trustee" and do not mention the creditors which these provisions were intended to benefit. As a prime example, the "avoidance" provisions of the Code, governing preferential or fraudulent conveyances of the debtor's property, on their face identify only the "trustee" but are meant to protect creditors by requiring the return of improperly transferred assets. *See* 11 U.S.C. §§ 544(a), 545, 547(b) (1994); 11 U.S.C.S. § 548(a) (Supp. 1999); 11 U.S.C. § 549(a) (1994). Under the rationale of the lower court's decision, creditors would be denied standing to sue for the return of property even though they were the parties directly injured by the unlawful conveyance.

The decision below should thus be reviewed because the Eighth Circuit's rule of statutory construction potentially constricts creditor standing under many provisions in the Code worded comparably to section 506(c). Indeed, precisely because of the parallelism between section 506(c) and these other provisions, another 4-2 circuit court split on creditor standing under the "avoidance"

provisions has arisen, as it has in section 506(c) cases. This Court's intervention is thus necessary to assure a uniform approach by bankruptcy judges and the district courts towards creditor standing under the Code.

Second, the decision below strips creditors of an equitable remedy they have had for more than a century. Section 506(c) was intended to codify pre-Bankruptcy Code law on the rights of claimants to recover post-filing administrative expenses. That pre-Code law had long allowed claimants that provide services to bankrupt companies to assert claims directly against the debtor's secured parties. *See, e.g., Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891).

This Court consistently has refused to construe the Code " 'to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.' " *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (citation omitted). Far from intending such a reversal of the pre-1978 law, Congress adopted section 506(c) to preserve it. Accordingly, the decision below should be reviewed because it is in conflict with this Court's decisions requiring deference to pre-Code practice absent a clear expression of contrary congressional intent.

Third, the decision below subverts another important policy of the Code—the chapter 11 policy encouraging reorganization of debtors rather than their liquidation. One way in which this policy is implemented is to provide assurance of payment to suppliers of goods or services necessary to maintain the bankrupt company as an operating business while it attempts to reorganize. The decision below frustrates this important policy without any clear-cut legislative instruction to do so. It sends a message to suppliers of essential goods and services that they deal with the debtor at their peril. The Eighth Circuit's

ruling should thus be reviewed because it creates a significant impediment to debtor reorganization—the primary goal of chapter 11.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED HAS IMPORTANCE NOT ONLY FOR THE SPECIFIC BANKRUPTCY CODE PROVISION AT ISSUE BUT ALSO FOR CREDITOR STANDING UNDER THE CODE GENERALLY

As the petition demonstrates, the Eighth Circuit's decision in *Hartford Underwriters Ins. Co. v. Magna Bank, N.A. (In re Hen House Interstate, Inc.)*, 177 F.3d 719 (8th Cir. 1999) (*en banc*) *("Hen House")* raises an important issue—an administrative expense claimant's standing to sue under section 506(c) of the Bankruptcy Code —on which the circuits have split 4-2. In addition, the decision below has major ramifications for the standing of creditors under the Code.

A debtor's creditors have an obvious financial stake in the bankruptcy proceeding and their interest in recovery lies at the center of the zone of interests protected by the Bankruptcy Code. Thus, a creditor's claims satisfy both the Article III "case or controversy" and prudential requirements for standing. *See Hen House*, 177 F.3d at 726-27 (Heaney, J., dissenting). As a result, in order to eliminate creditor standing under a particular Bankruptcy Code provision, there must be some express indication of Congress' intent to make such an exception. *Id.* at 726. In the Code, Congress frequently has done so by inserting language in a specific provision expressly denying standing to designated parties or by using the term "only" to limit the parties with standing. *See* Petition, at 16-17 (citing twenty examples of such provisions in the Code).

Section 506(c) contains no such exclusionary language. It simply provides that "the trustee may recover" certain post-filing administrative costs and expenses from a secured creditor's collateral. It does not additionally state that "only" the trustee may seek recovery or expressly deny a claimant's right to directly petition the bankruptcy court where the recoverable expense was incurred by reason of the claimant's goods or services. The Eighth Circuit nevertheless held that administrative expense claimants such as petitioner Hartford Underwriters Insurance Company ("Hartford") lack standing under section 506(c) because that provision does not explicitly refer to them in addition to the "trustee."

Numerous other provisions of the Code are worded similarly to section 506(c). As a consequence, the rule of construction adopted in the decision below has general significance for creditor standing. For example, the "avoidance" provisions of the Code uniformly provide that "the *trustee* may avoid" various liens and transfers without express reference to any other party in interest. 11 U.S.C. §§ 544(a), 545, 547(b) (1994); 11 U.S.C.S. § 548(a) (Supp. 1999); 11 U.S.C. § 549(a) (1994) (emphasis added).[3]

Under the Eighth Circuit's rationale in *Hen House*, the single reference to "trustee" in the avoidance provisions would be construed to deprive creditors and their committees of standing notwithstanding that they are the ones who were injured by the preferential or improper trans-

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[3] "Avoidance" provisons authorize recovery, on behalf of the bankruptcy estate, of certain improper or unauthorized transfers of money or liens made by a debtor to third parties. For example, § 547 authorizes the recovery of preferential transfers made within 90 days (or in the case of insiders, one year) before the bankruptcy petition. The other provisions cited above address unperfected liens (§ 544), statutory liens such as those for rent (§ 545), fraudulent transfers (§ 548) and unauthorized post-petition payments (§ 549).

fers voidable under these provisions. Indeed, the Eighth Circuit already has taken this view but other circuits have disagreed—giving rise to another 4-2 circuit split over interpretation of the avoidance provisions as over interpretation of section 506(c). *Compare Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436, 1438 (6th Cir. 1995) (granting individual creditor standing to bring suit under §§ 547 and 548 to recover preferential or fraudulent conveyances); *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1362-63 (5th Cir. 1986) (unsecured creditors committee had standing to bring action under § 547); *Unsecured Creditors Committee of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904 (2d Cir. 1985) (committee granted standing to bring preference action); and *Official Unsecured Creditors Comm. of Suffola, Inc. v. U.S. Nat'l Bank of Oregon (In re Suffola, Inc.)*, 2 F.3d 977, 979 n.1 (9th Cir. 1993) (same), *with Saline State Bank v. Mahloch*, 834 F.2d 690, 694-95 (8th Cir. 1987) (individual creditor lacked standing to bring action to avoid lien under § 544); and *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988) (creditor held not to have standing to sue under §§ 544(b) or 548(a)).

The arguments asserted for and against creditor standing under the avoidance provisions echo the debate over section 506(c). Like the dissenters in *Hen House*, the circuits adopting the majority rule favoring creditor standing emphasize the lack of economic incentive for a trustee or debtor in possession to bring the avoidance action, in contrast to the creditor, which has a direct financial stake. *Gibson Group*, 66 F.3d at 1440-41; *Coral Petroleum*, 797 F.2d at 1363; *STN Enters.*, 779 F.2d at 904. On the other hand, like the majority in *Hen House*, the circuits adopting the minority rule contend that allowing individual creditors to sue might disproportionately benefit them to the detriment of other unsecured creditors. *Saline State Banks*, 834 F.2d at 694; *Xonics Photochemical*, 841 F.2d at 202.

The linkage between standing under section 506(c) and the avoidance provisions is further reflected by the reliance on section 506(c) precedent in the avoidance cases. For example, the Sixth Circuit in *Gibson Group* relied heavily on the reasoning of the Third Circuit in *Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Castings Co.)*, 799 F.2d 91 (3d Cir. 1986), the leading circuit decision granting standing to an individual creditor under section 506(c). *Gibson Group*, 66 F.3d at 1443-44. This divergence in section 506(c) and avoidance cases over the standing of parties other than the trustee has spilled over to yet other similarly-worded provisions of the Bankruptcy Code and Bankruptcy Rules.[4]

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[4] *Compare In re Brileya*, 108 B.R. 444, 447 (Bankr. D. Vt. 1989) (limited reference in § 1206 to sale of property by "trustee" includes chapter 12 debtor-in-possession), *with In re Webb*, 932 F.2d 155, 158 (2d Cir. 1991) (authorizing sale by chapter 12 debtor but only because trustee approved sale which was deemed "the functional equivalent of his selling the property"); *compare Tindall v. Mavrode (In re Mavrode)*, 205 B.R. 716, 719 (Bankr. D.N.J. 1997) (court authorized settlement under Bankruptcy Rule 9019 even though motion for approval was not brought by trustee, the only party mentioned in that rule), *with In re Nationwide Sports Distribs.*, 227 B.R. 455, 462 n.3 (Bankr. E.D. Pa. 1998) (language of Rule 9019(a) limits its application to the trustee); *compare Freeman v. Eli Lilly Federal Credit Union (In re Freeman)*, 72 B.R. 850 (Bankr. E.D. Va. 1987) (chapter 13 debtor granted authority to avoid lien under § 544 (a) even though that provision not expressly listed in § 1303 regarding powers of chapter 13 debtor) and *Carr v. Demusis (In re Carr)*, 34 B.R. 653, 655 (Bankr. D. Conn. 1983) (same), *aff'd*, 40 B.R. 1007 (D. Conn. 1984), *with Walls v. Appalachian Tire Prods., Inc. (In re Walls)*, 17 B.R. 701, 703 (Bankr. S.D. W.Va. 1982) (chapter 13 debtor lacked standing to bring

In sum, a pervasive split has developed between the lower courts regarding creditor standing under the Bankruptcy Code. One school of thought precludes standing by creditors, unless expressly identified in the relevant substantive provision of the Code, notwithstanding that the creditors have significant financial interests at stake which that provision was designed to protect. Another school of thought recognizes that Congress sought to protect creditors with direct financial interests and therefore grants standing absent an express denial. Supreme Court review is thus needed to establish a uniform rule for the national bankruptcy system.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULE THAT REMEDIES EXISTING PRIOR TO ENACTMENT OF THE BANKRUPTCY CODE SHOULD BE PRESERVED, ABSENT CONTRARY CONGRESSIONAL INTENT

The Eighth Circuit's decision effectively means that a vendor furnishing goods or services, after the bankruptcy filing, that preserve the collateral of a secured creditor is denied any effective remedy for nonpayment. This ruling should be reviewed because it conflicts with (1) the pre-Code case law that Congress intended to codify and (2) this Court's rule of deference to pre-Code practice.

Although interpretation of the Bankruptcy Code (like other statutes) must begin with its language, *see United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), the meaning of section 506(c) on the question of standing is far from "plain." As noted above (*see* p. 6 *infra*), there are at least *twenty* Bankruptcy Code provisions where Congress expressly limited standing, either by using the word "only" to limit the parties with standing

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preference action under § 547) and *In re Carter*, 2 B.R. 321, 322 (Bankr. D. Colo. 1980) (same under § 544).

or by explicitly denying certain parties a direct right of action. In contrast, section 506(c) contains no such restrictive language. The fact that Congress chose not to employ such language in section 506(c) creates, at a minimum, ambiguity that justifies reference to the Code's legislative history and to pre-Code practice. *See Dewsnup v. Timm*, 502 U.S. 410, 417 (1992); *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1417 (1999) (referring to pre-Code practice where language of Code is "inexact").

There was a federal bankruptcy practice in existence decades before passage of the Code and, indeed, even before enactment of the comprehensive Bankruptcy Act of 1898 which remained in effect until promulgation of the Code in 1978. 1 COLLIER ON BANKRUPTCY ¶ 1.01, at 1-3 to 1-6 (15th ed. 1999). As a result, when Congress amends the bankruptcy laws, "it does not write 'on a clean slate.'" *Dewsnup v. Timm*, 502 U.S. at 419 (quoting *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). In *Dewsnup*, the Court announced a rule of statutory construction where, as here, a Code provision was ambiguous. The courts should not interpret the Code to deny a right or remedy that existed under pre-Code practice (or grant a new right or remedy), without some concrete indication in the legislative history that Congress intended to alter the prior practice. 502 U.S. at 419-20. More recently, this Court reaffirmed that it "'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Cohen v. De La Cruz*, 523 U.S. at 221 (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1990)).

The legislative history of 506(c) shows that it "codifies current law." H.R. Rep. No. 95-595, at 357 (1977)

reprinted in 1978 U.S.C.C.A.N. 5787, 6313. That "current law" allowed claimants who provided services during bankruptcy or receivership to bring claims directly against secured collateral.

This pre-Code rule was established long ago. One of the earliest cases was *Louisville, Evansville & St. Louis R.R. v. Wilson*, 138 U.S. 501 (1891), where this Court authorized an attorney to recover $300 from the sale proceeds of collateral for legal services that enabled the recovery and rental of train engines to the benefit of the security holders. The Court held that the attorney had a direct right of recovery against the property where the receiver lacked the capacity or will to pursue the claim:

> [W]hen he [the receiver] has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment [of the receiver], but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

Id. at 506. The rationale for this rule was the very same as for present day section 506(c): "We think it may fairly be held that the [secured] party who takes the benefit of such a service [by an administrative expense claimant] ought to pay for it and that equity may properly decree payment therefor." *Id.* at 507.

A similar ruling was made in *In re Rotary Tire & Rubber Co.*, 2 F.2d 364 (6th Cir. 1924). Brokers who provided insurance during the bankruptcy sought direct recovery of premiums against the sale proceeds of the insured property, even though the property was subject to

a $35,000 mortgage. The lower court held, and the Sixth Circuit affirmed, that the brokers were entitled to priority for premiums in an amount equal to the mortgage, because the insurance preserved the value of the mortgaged property. *Id.* at 364.

Other pre-Code decisions also allowed claimants other than the trustee to bring claims directly against secured property. *See, e.g., National Acceptance Co. v. District No. 1, Progressive Mine Workers of Am. (In re Chapman Coal Co.)*, 196 F.2d 779, 781 (7th Cir. 1952) (union brought successful petition to obtain first lien on previously-secured assets of corporation for wages incurred to preserve the assets); *First W. Savs. & Loan Ass'n v. Anderson*, 252 F.2d 544, 550 (9th Cir. 1958) (court held that attorney as well as trustee entitled to first lien on secured property for fees for services rendered); *United States v. Henderson*, 274 F.2d 419, 422 (5th Cir. 1960) (both trustee and attorneys were parties to action for recovery of fees from mortgagee's collateral); *Citizens & Southern Nat'l Bank v. Mullins (In re Bolton Rd. Med. Ctr.)*, 433 F. Supp. 369, 371 (N.D. Ga. 1976) (both trustee and his attorneys were parties to proceeding for recovery of expenses against secured property); *In re Alaska Plywood Corp.*, 166 F. Supp. 423, 425 (D. Alaska 1958) (both trustee and stockholders committee requested and received priority against mortgaged assets superior to that of secured creditors).

The pre-Code practice codified in section 506(c) thus demonstrates that Congress intended to preserve, not to withhold, the right of administrative expense claimants such as Hartford to move the bankruptcy court for payment out of the collateral of secured creditors. The petition should therefore be granted in order to review a decision that frustrates this Congressional objective and

does so by ignoring this Court's rule favoring continuity in interpretation of the nation's bankruptcy laws.

III. THE DECISION BELOW PRESENTS AN ISSUE OF GENERAL IMPORTANCE BECAUSE IT UNDERMINES CONGRESSIONAL POLICY FAVORING REHABILITATION OF DEBTORS

As this Court has recognized, the policy underlying chapter 11 of the Bankruptcy Code is to promote rehabilitation of debtors by giving them time to reorganize as going concerns, where possible, rather than being immediately liquidated. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984); *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. Partnership*, 119 S. Ct. at 1421.

Section 503 was enacted to implement this policy. That provision recognizes that, in order to maintain the debtor as a viable business while it attempts to reorganize, there must be some assurance of payment to suppliers of necessary goods and services without which the debtor could not continue operating. Section 503 encourages suppliers to provide such goods and services by giving them a priority in payment over other unsecured creditors out of the debtor's remaining unencumbered assets. *See* 11 U.S.C. § 503 (1994).

The reality, however, is that the debtor often has no such unsecured assets. In *Hen House*, for example, Magna Bank had a lien on the debtor's cash reserves. 177 F.3d at 721. Section 506(c) has thus evolved under bankruptcy law into an important complement to Section 503. Where unencumbered assets are insufficient to pay administrative expenses, section 506(c) allows payment out of the collateral securing a lender's credit, either by consent or upon a showing that the expense provided a direct benefit to the secured creditor or its collateral. This provides vendors with greater assurance that they will be paid for services rendered to an insolvent business.

Section 506(c) is not adverse to the secured creditor's interests. Often, the value of the creditor's collateral is higher if the business can be preserved or sold as a going concern. In such a case, the secured creditor benefits from section 506(c) expenses because the lender can recover more if the debtor successfully reorganizes than if the debtor's assets are liquidated at fire sale prices. Section 506(c) thus carefully balances the chapter 11 policy favoring reorganization with the rights of secured creditors.

The decision by the Eighth Circuit upsets this careful balance. Vendors will not sell the debtor necessary goods and services, and professionals will not perform services for the bankruptcy estate, unless there is reasonable assurance of receiving payment. They will not have that assurance if they are prevented from directly obtaining an order from the bankruptcy court requiring payment out of secured collateral. The administrative expense claimant's only remedy would then be to rely on the trustee to assert its claim before the bankruptcy court. The trustee, however, lacks the same incentive to pursue payment because the trustee's mission is to preserve the debtor's estate and because he or she usually has higher priorities. This case presents a concrete example of why the trustee may not zealously protect the claimant's interests.

Workers' compensation insurance is the quintessential type of good or service necessary to preserve the going concern value of a business in chapter 11. Insurance not only provides economic protection to the employer but is legally required. Every state except Texas requires employers, in order to finance workers' compensation benefits

paid to injured employees, to purchase insurance or to self-insure.[5]

In many jurisdictions, the State Labor Department can shut down a company that fails to secure workers' compensation insurance coverage. In some states, an uninsured employer can be sued in tort by injured employees, who can recover substantially more than the statutorily-prescribed workers' compensation benefits. These tort claims, if they occur after the bankruptcy filing, are treated as an administrative expense that could seriously diminish the debtor's assets. *See Reading Co. v. Brown*, 391 U.S. 471, 485 (1968).

An employer that becomes insolvent and enters chapter 11 does not have the statutorily-required financial resources to qualify for self-insurance. Insurance must therefore be purchased from a licensed carrier. Insurers, however, will be unwilling to provide coverage if they do not have an effective means for obtaining payment of premiums. Outside of bankruptcy, the insurer may cancel a policy during the policy period for nonpayment. But this option is not available in bankruptcy, because the Code generally forbids termination of contracts with the debtor absent relief from the automatic stay. *See* 11 U.S.C. § 362 (1994). Thus, once an insurer agrees to underwrite insurance for a bankrupt employer, it may be "locked in" and required to pay benefits to insured employees even if the employer defaults in payment of premiums. The trustee, in turn, has little incentive to deplete the assets of the estate to pay premiums because coverage is assured irrespective of

[5] *See, e.g.*, Ariz. Rev. Stat. § 23-961; Cal. Lab. Code § 3700; Conn. Gen. Stat. § 31-284; Fla. Stat. Ann. § 440.38; 820 Ill. Comp. Stat. § 305/4; Ky. Rev. Stat. Ann. § 342.340; Md. Code Ann., Lab. & Empl. § 9-402; Mass. Gen. Laws (Ann.) ch. 152, § 25A; Minn. Stat. § 176.181; Mo. Rev. Stat. § 287, 280; N.Y. Work. Comp. Law § 50; Va. Code Ann. § 65.2-801.

payment. As a result, absent direct recourse to the bankruptcy court, insurers may decline to underwrite coverage out of concern they will never be paid.

Conversely, the ruling below cannot be justified as necessary to support the Code's policy of protecting creditor collateral. If the administrative claimant is permitted to present its claim directly to the bankruptcy court, it can recover only if it demonstrates that the expense was reasonably necessary for the preservation of the debtor's collateral *and* was of direct benefit to the secured lender. *See* 11 U.S.C. § 506(c) (1994).

Nor can the decision below be justified as needed to prevent preferential treatment of one unsecured claimant at the expense of others, as circuits adopting the minority rule have held. *See Hen House*, 177 F.3d at 723; *Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Chevrolet, Inc.)*, 26 F.3d 481, 484 (4th Cir. 1994). As the dissent in *Hen House* correctly points out, the whole purpose of § 506(c) is to create a priority for certain administrative expense claimants over other creditors. 177 F.3d at 727.

The decision below should thus be reviewed because it is inconsistent with the general policy of chapter 11 favoring reorganization and the specific tool for implementing that policy Congress fashioned in section 506(c).

CONCLUSION

For the reasons stated herein, this Court should grant the petition for review of the Eighth Circuit's decision.

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